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Office - Supreme Court, U.S.
FILED
JUN 7 1985
ALEXANDER L. STEVAS.
CLERK

No. 84-1782

In the Supreme Court of the United States

October Term, 1984

SMYTHE, CRAMER COMPANY, L. B. McKELVEY, as President of Smythe, Cramer Company, BARBARA DAVIS, Individually and as Agent of Smythe, Cramer Company,

Petitioners,

vs.

DR. WILLIAM A. SMITH and MRS. BETTY SMITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT OF CERTIORARI

Plaintiffs-respondents Dr. William A. Smith and Mrs. Betty Smith initiated this action under the Federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601, *et seq.*, and under the Civil Rights Acts of 1870 and 1866, 42 U.S.C. §§1981 and 1982, alleging racially discriminatory housing practices by defendants-petitioners, Smythe, Cramer Company, a real estate firm and its agents. Suit was brought in the United States District Court for the Northern District of Ohio. As a

result of the plaintiffs-respondents' filing, a temporary restraining order was issued and plaintiffs-respondents were ultimately able to obtain the house at issue. At trial, however, a directed verdict was entered. Several years after the dismissal, the court granted attorney fees to the real estate firm under the Civil Rights Attorney Fees Award Act of 1976, 42 U.S.C. §1988.

Plaintiffs-respondents appealed the assessment of attorney fees against them to the United States Court of Appeals for the Sixth Circuit. Based on the entire transcript, the Sixth Circuit held plaintiffs-respondents established a reasonable basis for instituting this action and reversed the fee award to the defendant-petitioner real estate firm. Defendants-petitioners now urge this Court to grant their petition for writ of certiorari.

The petition should be denied because (1) there is no new substantial question of federal law involved as this Court has already clearly addressed the issue; (2) there is no conflict within the circuits as this Court has previously clearly and definitively established standards at issue; (3) the United States Court of Appeals here reversed the District Court for an abuse of discretion based upon a complete factual record; and (4) the right and fair result was reached by the Court of Appeals.

A. There Is No Substanial Federal Question

Both the District Court and the Sixth Circuit acknowledged that the proper authority for determining an award of attorney fees to a prevailing defendant was this Court's opinion in *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978).

> In sum, a district court may in its discretion award attorney fees to a prevailing defendant in a Title VII

> case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith. *Id.* at 421.

The District Court and Court of Appeals both cited authority applying this Title VII case to fee awards under the Attorney Fees Award Act.

The Sixth Circuit, recognizing that "[t]he standards for awarding attorney fees to prevailing defendants are well established," *Smith v. Smythe, Cramer Co.*, 754 F.2d 180, 182 (6th Cir. 1985), stated that:

> Application of these standards requires inquiry into the plaintiffs' basis for bringing suit. Awards to prevailing defendants will depend on the factual circumstances of each case. *Id.* at 183.

The *Christiansburg* standard is not whether the plaintiff fails to prevail, as petitioners argue in urging this Court to grant their petition, but whether a case is unreasonable or without foundation. Here, based upon the entire record, the Court of Appeals found that the plaintiffs-respondents' claims of housing discrimination were supported by some evidence and were not unreasonable. *Id.* at 186.

B. There Is No Conflict Within the Circuits

There is no conflict within the circuits on the issue of the standards for attorney fee awards for prevailing defendants in civil rights actions as this Court has spoken clearly on the subject. In all lower court cases dealing with this issue, the *Christiansburg* standard was clear, with courts making factual determinations whether an action was groundless or frivolous or whether, as here, the claim was one of arguable merit.

In reversing an award of fees to a defendant, for example, the Fifth Circuit explained that it is necessary to stress the specific factual findings of an action being groundless or frivolous which assert discrimination in order to justify consideration of an award. *E.E.O.C. v. Eastex, Inc.*, 568 F.2d 403 (5th Cir. 1978). Another court inquired whether the plaintiff presented a "scintilla of evidence" supporting the complaint in considering an award of attorney fees for the defendant. *American Family Life Assur. of Columbus v. Teasdale*, 564 F. Supp. 1571 (E.D. Mo. 1983). Other courts have denied fees where the plaintiff has an arguable basis for the claim. *Clark v. Universal Builders*, 706 F.2d 204 (7th Cir. 1983).

The *Christiansburg* standard is clear. There is no conflict within the circuits as to the standards to apply in awarding attorney fees to a prevailing defendant. A factual determination must be made on a case-by-case basis.

C. The Reversal of an Award of Attorney Fees to a Prevailing Defendant Was Based on the Complete Factual Record as an Abuse of Discretion

Based upon a series of incidents between the plaintiffs and defendants involving the purchase of a home and based upon the advice of plaintiffs' own real estate agents and other real estate professionals that the defendants' actions constituted a departure from normal and customary real estate procedures, the plaintiffs-respondents brought suit under the Fair Housing Act and Civil Rights Acts of 1870 and 1866.

At trial, both plaintiffs-respondents testified as to the incidents that caused them to believe that they were being treated differently because of their race. Repre-

sentatives of the real estate firm which represented the plaintiffs-respondents, various lending officials and an attorney all testified that the actions of the defendants-petitioners were a departure from customary real estate practices.

At trial, it was established that on the day the financing contingency was to expire, the plaintiffs-respondents' banker informed the defendants-petitioners that financing had been approved, subject to obtaining private mortgage insurance (PMI). He also informed the defendants-petitioners that he was confident that PMI would be granted as he had already discussed it with the PMI company. (It was granted three days later.)

Rather than relate this information, the defendants-petitioners merely told the sellers that financing had not been approved. Testimony at trial showed that the defendant-petitioner agent was familiar with PMI. In addition, the defendant-petitioner agent testified it is a normal real estate practice to give people extra time if a contingency is not met. Further testimony by the seller showed that no information about PMI had ever been related by the defendants-petitioners and, had the seller known about the realities of PMI, she and her husband would have given the plaintiffs-respondents more time and accepted the plaintiffs-respondents as purchasers.

There was additional testimony by the plaintiffs-respondents of a number of other events that caused them to believe race was a reason for the defendants-petitioners' actions.

In spite of the above testimony, the District Court made a factual determination that the evidence established that the plaintiffs-respondents were aware from the beginning that the claim of discrimination was frivolous.

The District Court said that evidence established that PMI was not customarily granted and that the plaintiffs-respondents knew this because they falsified the financial statement portion of their PMI application. Evidence at trial showed that the plaintiffs-respondents' loan officer had incorrectly listed minority inducement funds from another lending institution as an asset rather than a liability. The District Court penalized the plaintiffs-respondents for what the court perceived as a deliberate and misleading representation on the loan application. Evidence at trial showed that the loan application in question was filled out and signed for a prior loan application and not re-signed by the plaintiffs-respondents even though the loan officer changed the data entered.

The Sixth Circuit, 754 F.2d 180 (6th Cir. 1985), reversed and held that the District Court abused its discretion by awarding attorney fees to the defendants. The Court of Appeals stated that there was absolutely no evidence that the plaintiffs were responsible, or even aware of, the incorrect entry. In addition, the Court of Appeals found the "overwhelming weight of the evidence was that PMI is indeed granted as a matter of course . . . ." *Id.* at 185.

The appeals court added that there was not only no basis for the district court's ruling that the plaintiffs-respondents had deliberately falsified their application, but even if there had been misconduct, "it would not have affected the validity of plaintiffs' claim." *Id.* at 185.

The Sixth Circuit concluded:

> Plaintiffs' belief that these departures from ordinary practice were due to their race was based on the advice of professionals familiar with real estate practice. Their claims of housing discrimination were not with-

> out foundation, frivolous or unreasonable. They were supported by some evidence. We conclude that the district court applied the *Christiansburg* standards incorrectly and abused its discretion in awarding attorney fees to defendants. *Id.* at 186.

Both the District Court and the Court of Appeals applied the *Christiansburg* standards. The ultimate issue was a factual determination in light of these standards.

CONCLUSION

Because the issues raised in the petition for writ of certiorari do not involve important questions of federal law, because there is no conflict within the circuits concerning the standards to be applied, because the ultimate issue is solely one of a factual determination and because the right and fair result was reached by the United States Court of Appeals for the Sixth Circuit, plaintiffs-respondents respectfully urge this Court to deny defendants' petition for writ of certiorari.

Respectfully submitted,

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